Supreme Court, U.S
FILED
OCT 7 2002
CLERK

(3)

No. 01-1782

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK J. GRIFFIN, III,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Michael F. Wright
Counsel of Record
CASE, KNOWLSON,
JORDAN & WRIGHT
2049 Century Park East
Suite 3350
Los Angeles, CA 90067
Tel.: (310) 552-2766

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
112 Whitewood Road
Charlottesville, VA 22906
Tel.: (434) 978-3888

Steven D. Campen, Esq.
Landon House
3401 Urbana Pike
Frederick, MD 21704
Tel.: (301) 668-5808

October 4, 2002

16 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

I. THE PETITION SQUARELY PRESENTS THE "UNLIMITED DISCRETION" ISSUE 1

II. THE VA REGULATIONS POSE A SUBSTANTIAL THREAT TO FREE EXPRESSION 6

III. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT PROCEDURAL SAFEGUARDS ARE REQUIRED IN A NONPUBLIC FORUM 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASE AUTHORITY

Arkansas Educ. Tel. v. Forbes, 523 U.S. 666 (1998) . . 9

Atlanta Journal and Constitution v. City of Atlanta, 277 F.3d 1322 (11th Cir. 2002) 6

Board of Airport Comm. v. Jews for Jesus, 482 U.S. 569 (1987) 4, 5, 7

City of Lakewood v. Plain Dealer Publ. Co., 486 U.S. 750 (1988) 7, 8

DeBoer v. Village of Oak Park, 267 F.3d 558 (7th Cir. 2001) 6

Freedman v. Maryland, 380 U.S. 51 (1965) 9

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990)9, 10

Griffin v. Dept. of Veterans Affairs, 129 F. Supp. 832 (D. Md. 2001), *rev'd*, 274 F. 3d 818 (4th Cir. 2001) . . . 9

Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002) 1, 3-5

Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001) 6

Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001), *cert. den. sub nom. Fischer v. Lewis*, 122 S. Ct. 1536 (2002) 2

Rosenberger v. Univ. of Virginia, 515 U.S. 819 (1995) 3

Sentinel Communications Co. v. Watts, 936 F.2d 1189 (11th Cir. 1991) 6

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 4

Texas v. Johnson, 491 U.S. 397 (1989) 2

United Food & Commercial Workers v. Southwest Ohio Regional Transit Authority, 163 F.3d 341 (6th Cir. 1998) 2

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

38 C.F.R. § 1.218(A)(14) 1, 7, 8

UNITED STATES CONST., AMEND. I ..... *passim*

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE PETITION SQUARELY PRESENTS THE "UNLIMITED DISCRETION" ISSUE.

Title 38 C.F.R. § 1.218(a)(14) "sets no explicit limit on the discretion of VA officials to permit exceptions" to the section's blanket speech prohibitions. *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002). The court concluded, *id.* at 1326-1327 (Pet. App. A27-28) and the Solicitor General argues (Brief in Opposition ("Opp.") at 9) that the 1995 and 2001 flag manuals issued by the Department of Veterans Affairs ("VA") limit the VA's discretion and leave "little room for arbitrary or discriminatory enforcement."

The flag manuals, however, do not save § 1.218(a)(14). The manuals have no effect on VA discretion with respect to verbal expression or other forms of non-flag speech. Petitioners' facial challenge to § 1.218(a)(14) includes verbal speech. With respect to all forms speech other than flag display, § 1.218(a)(14) sets no limits on official discretion. (*See* Pet. App. A20.) The issue of whether such standards are required in a nonpublic forum thus is squarely presented, regardless of any effect the flag manuals may have in curbing official discretion with respect to flag display.

Moreover, the manuals do not constrain VA discretion. Paragraph 2a. of the VA's New Flag Manual ("NFM") of April 30, 2001 (Pet. App. D.) states the VA's general policy applicable to *all* flag display:

> [F]lags *may not be displayed* on NCA property as a means for political activity or similar conduct that *promotes*

any viewpoint or ideology other than to commemorate military service.

(Emphasis added) (Pet. App. at B3-4) This policy empowers VA officials to interpret a flag display and prohibit it based on the viewpoint(s) the official subjectively attributes to the flag. A flag is "[p]regnant with expressive content," and thus can express a variety of viewpoints. *Texas v. Johnson*, 491 U.S. 397, 405 (1989). "A [VA] official with even marginal creative ability" therefore "could frequently invent a ['viewpoint or ideology'] basis for rejecting a [flag display]... which he or she [finds objectionable]." *Lewis v. Wilson*, 253 F.3d 1077, 1081 (8th Cir. 2001), *cert. den. sub nom. Fischer v. Lewis*, 122 S. Ct. 1536 (2002) (statute that allowed officials to deny personalized license plate if message was "contrary to public policy" unconstitutional); *see also United Food & Commercial Workers v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 360 (6th Cir. 1998) ("aesthetically pleasing" speech requirement presented "danger of arbitrary and discriminatory application that violates the basic principles of due process"). For example, a VA official could decide that display of a Confederate flag does not merely honor Confederate soldiers but also honors the Confederate cause. Under ¶ 2a., the official could prohibit the display on the grounds that, in his subjective opinion, it expressed a forbidden viewpoint. The ability to prohibit speech on the basis of a subjective interpretation of symbolic speech is the exercise of an unlimited official discretion.

Further, the VA's policy statement *expressly mandates viewpoint discrimination*. The whole purpose of official scrutiny under ¶ 2a. is to determine whether a proposed display is intended to promote a disfavored "viewpoint or ideology...." Viewpoint-based scrutiny of speech, however, violates the Frist Amendment.

Rosenberger v. Univ. of Virginia, 515 U.S. 819, 829 (1995). Certainly it would be a novel result for government to "narrow" official discretion by "specifying" the viewpoints government officials may suppress. Neither the Federal Circuit nor the Solicitor mentions this overarching VA policy, which applies to all flag display in VA cemeteries. Paragraph 2a. alone removes any "constraining effect" of the NFM on VA discretion.

Other provisions of the NFM exhibit the same defects. Paragraph 2d. (Pet. App. B5) provides that "[c]ertain other flags" may be displayed (1) "on special occasions," provided they (2) "are not intended to promote any particular viewpoint or ideology other than the wish to commemorate military service." It then lists some examples. According to the Federal Circuit, this level of discretion is constitutional. *Griffin*, 288 F.3d at 1327. (Pet App. A28.) But the court cites no authority for this proposition. There is none. A determination of the "specialness" of an occasion involves unbridled discretion. Is George Washington's birthday a special occasion? Is the anniversary of the Battle of Antietam "special"? Is the annual reunion of the descendants of a deceased soldier "special"? "Specialness" is both subjective and vague, which are hallmarks of unbridled discretion. Moreover, aspect (2) of ¶ 2d. not only mandates viewpoint discrimination, but requires VA officials to go a step further and examine the expressive "intent" behind a proposed flag display. Speculation as to the speaker's intent, especially when employed to ferret out disfavored viewpoints, can only be described as a blatant form of unlimited official discretion. That such wide-open discretion bothered the Federal Circuit not at all is troubling indeed.

While space limitations prohibit a full discussion of the NFM, other provisions confer unlimited discretion on VA officials. *See* ¶¶

2f. , 2g., 7a., 7c., ¶ 7d. The NFM thus is full of provisions that either (1) permit VA officials to deny permission to display a disfavored flag on the basis of vague, subjective and explicitly viewpoint-based criteria, or (2) prescribe no standards at to guide official discretion. With respect to flag display, this case therefore raises the issue of whether speech regulations that confer unlimited discretion on government officials are constitutional in a nonpublic forum.

According to the Federal Circuit, "no Supreme Court case has suggested that the [unbridled discretion] is applicable outside the setting of a public forum." 288 F.3d at 1321, 1322. The Solicitor argues (Opp.at 9) that all "the Court's 'unbridled discretion' decisions have dealt with speech in *public* fora...." If the Solicitor is right, that is a compelling argument for review. The rule against unbridled discretion is one of the major protections the First Amendment affords to speech. Whether this protection applies in a nonpublic forum is a critical issue. The Solicitor thus makes a strong argument in support of granting review in this case.

Petitioners believe that in *Board of Airport Comm. v. Jews for Jesus*, 482 U.S. 569, 576 (1987), the Court applied a principle akin, if not identical, to *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969) in rejecting the airport commission's attempt to limit its speech prohibition to "nonairport-related" speech.[1] Petitioners further submit that the lines the NFM calls for

---

[1] The Federal Circuit, 288 F.3d at 1319 n. 7, 1321, cites *Jews for Jesus* at pages 574-575 for the proposition that an entirely unreasonable restraint will be held unconstitutional. But it does not cite the portion of the opinion at p. 576 in which the Court, in what it assumed to be a nonpublic forum for purposes of analysis, rejected

VA officials to draw (*i.e.*, the lines between "commemorat[ing] military service and forbidden viewpoints) are at least as "murky" as that held impermissible in *Jews for Jesus*. But unquestionably, both the Federal Circuit and the Solicitor *believe* they are without Supreme Court guidance in this area. That belief alone should induce the Court to grant the petition.

The Federal Circuit, 288 F.3d at 1323-1325 (Pet. App. A23-26), held that the amount of discretion conferred by the VA is reasonable in light of the special nature of a national cemetery. The Solicitor argues (Opp. at 10-11) that Petitioners "fail to account for the greater leeway" the First Amendment gives government to regulate speech in a nonpublic forum. Significantly, as discussed *supra*, the discretion § 1.218(a)(14) confers is unlimited and is not constrained by the VA's flag manuals. The Federal Circuit and the Solicitor thus endorse unlimited discretion in certain, special nonpublic fora.

Logically, there are only three possible rules with respect to whether unlimited discretion is permissible in a nonpublic forum. Unlimited discretion is either (1) always acceptable in a nonpublic forum; (2) never acceptable; or (3) acceptable in some nonpublic fora but not others. No one advocates option (1). The Solicitor (Opp. at 10-11) and the Federal Circuit, 288 F.3d at 1324-1325 (Pet. App. A23-26) adopt option (3), based on the special nature of a national cemetery. Their proposed rule, however, requires that a line be drawn between those nonpublic fora where unbridled

---

the airport vs. non-airport distinction as too "murky" to pass First Amendment muster. The Solicitor does not mention *Jews for Jesus* at all in his opposition, although Petitioners argued the case (Pet. at 16).

discretion is permitted and those more special "fora" where it is not. In most, if not all, cases such a line would be impossible to draw.

One need not denigrate the importance of maintaining the tranquility and dignity of a national cemetery to recognize that a similar argument can be made for virtually every nonpublic forum. Other circuits have held that government's interests in assuring that local government operates without disruption, *DeBoer v. Village of Oak Park*, 267 F.3d 558, 573 (7th Cir. 2001), that drivers avoid fatal accidents by finding rest at roadside stops, *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991), that violent incidents of "road rage" do not occur on the highways, *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001), or that passengers move without disturbance through an airport, *Atlanta Journal and Constitution v. City of Atlanta*, 277 F.3d 1322 (11th Cir. 2002), do not justify the exercise of unlimited official discretion in a nonpublic forum. If the interest in maintaining the atmosphere in a national cemetery calls for a different result, a hierarchy of fora must be established, based on some discernible criteria. The above cases suggest that in most cases, the line between the more- and less-protected nonpublic fora would be impossible to draw. Therefore the only workable rule is (2), *i.e.*, that unbridled discretion is *never* acceptable in a nonpublic forum. This is the position the Federal Circuit rejected as "extreme." 288 F.3d at 1321 (Pet. App. A18). Petitioners submit that the opinion below further confuses this area of the law by establishing a chaotic hierarchy of nonpublic fora, in some, but not all, of which unbridled discretion is permissible. To bring order to this chaos the Court should grant review.

II. The VA Regulations Pose a Substantial Threat to Free Expression.

The Solicitor defends (Opp. at 11-12) the Federal Circuit's holding, 288 F.3d at 1325-1326 (Pet. App. A26-30), that Petitioners purportedly failed to show that the VA's regulations pose a "real and substantial risk to protected speech." The court seems to require an evidentiary showing on this issue, although it acknowledges that "the opportunity to present [such] evidence is limited if a facial challenge may be brought only in an appellate court..." *Id.* at 1326 (Pet. App. A26).[2] The court does not say what the showing would have to prove or how Mr. Griffin might go about presenting the evidence. As pointed out in the Petition (at 26-27), no such showing was required in *Jews for Jesus*. Contrary to the decision below and the Solicitor (Opp. at 11-12), however, Petitioners satisfy *this Court's* criteria for showing such a "real and substantial risk" to speech. In *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 758-759 (1988) the Court held that a "real and substantial" threat to free speech existed where (1) the ordinance required newspapers to apply annually for newsrack licenses; and (2) the ordinance was "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers."

Section 1.218(a)(14) meets both criteria. A person or organization seeking to display a flag or hold any kind of group event at an NCA cemetery must apply for permission from the VA, not just annually but each time they wish to speak. Section 1.218(a)(14) also is narrowly focused on speech and expressive conduct. Petitioners' challenge thus satisfies *Lakewood*'s

---

[2] The court did not suggest what kind of evidence Petitioners might offer to meet this requirement. Perhaps Petitioners would be required to show how many persons have been arrested by the VA, the number of visitors to VA cemeteries or other facts.

requirement of a "real and substantial threat." The Federal Circuit, however, ignores this aspect of the *Lakewood* opinion. The Court should grant review to clarify whether satisfying the *Lakewood* is enough to permit a facial challenge to succeed.[3]

III. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT PROCEDURAL SAFEGUARDS ARE REQUIRED IN A NONPUBLIC FORUM.

The Solicitor asserts (Opp. at 15) that procedural safeguards are only required when government seeks to shield the public from offensive speech, not in this case because the VA's regulations purportedly are "content-neutral." This assertion is not only wrong; it borders on being disingenuous. Section 1.218(a)(14)(ii) prohibits "commentary... in support of, or in opposition to, or attempting to influence any current policy" of the federal government or any private group. This prohibition is expressly content- and indeed viewpoint-based. Similarly, the VA's flag manuals distinguish among Confederate flags, "[c]ertain other flags," the United States flag and the POW/MIA flag. The difference among these flags is purely one of content and viewpoint.

Throughout more than two years of litigation, moreover, the VA's mantra has been that the Confederate flag sends a message that is inappropriate in a national cemetery 363 days a year. In the district court, the VA continually referred to the Confederate flag as

---

[3] As the dissent noted, the VA's regulations affect all speech at all VA properties, including its vast network of hospitals and offices, as well as its 119 cemeteries. *Griffin*, 288 F.3d at 1321 (Dyk, J., concurring in part and dissenting in part). A government regulation of such breadth clearly reaches a substantial amount of speech.

a "symbol of racial intolerance and divisiveness." *Griffin v. Dept. of Veterans Affairs*, 129 F. Supp. 832, 843 (D. Md. 2001), *rev'd*, 274 F. 3d 818 (4th Cir. 2001). The purported message of the Confederate flag – *i.e.*, content and viewpoint – are at the heart of the Fourth Circuit's decision, 274 F.3d 818, which Mr. Griffin has asked the Court to review in Case No. 01-1687. For the Solicitor now to claim that the VA's speech regulations are "content-neutral" is the very opposite of its consistent and strident theme throughout two years of litigation.

The Federal Circuit held (Pet. App. A.31) that the "procedural safeguards requirement provides little or no independent basis for striking down a regulation in a nonpublic forum." But as the Court recognized in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226-227 (1990) and *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965), where government officials have unlimited time to issue a license to speak, the prospect of indefinite delay poses the same threat to speech as unbridled discretion to exclude speech. The policy against censorship in nonpublic fora therefore requires procedural safeguards. *Jews for Jesus*, 482 U.S. at 576, and the dissent in *Arkansas Educ. Tel. v. Forbes*, 523 U.S. 666, at 683-686 (1998), support the proposition that *Shuttlesworth* applies, or should apply, in a nonpublic forum. By the logic of *FW/PBS* and *Freedman*, procedural safeguards are equally necessary in nonpublic fora. Without them, censorship and self-censorship still threaten speech.

Contrary to the Federal Circuit's reasoning, 288 F.3d at 1328-1329 (Pet. App. A.32), the VA's regulations do not limit the time within which VA officials may grant or withhold permission to speak. Section 1.218(a)(14) imposes no time limits whatsoever. The only limitations of any kind are found in the NFM, but they do

not apply outside the flag context, and even within that context are ineffective. For example, the NFM provides no time limits for a standard request to display a flag under ¶2d. Contrary to the Solicitor's argument (Opp. at 15), although ¶ 2b. sets some time limits with respect to requests for a deviation from normal VA flag policy, a "gap" in the process permits indefinite delay.[4] The Court held a similar defect, the absence of a time limit within which necessary inspections were to occur, fatal to the challenged regulation in *FW/PBS*, 493 U.S. at 227.

Only two procedures (initial requests under ¶ 7c. to display the Confederate flag on the two permitted days and requests under ¶ 7d. to hold ceremonies with a Confederate flags on additional days) in the NFM are subject to time limits. VA decisions with respect to non-flag speech and almost all of its decisions concerning flag displays thus are subject to indefinite delay. Without doubt the issue of whether procedural safeguards are required in a nonpublic forum is squarely presented in this case.

CONCLUSION

For the reasons discussed herein, Mr. Griffin respectfully suggests that the petition for certiorari should be granted.

Respectfully Submitted,

---

[4] A request for a deviation goes from the cemetery director to the Memorial Service Network ("MSN") Director, and then from the MSN Director to the Deputy Under Secretary for Operations ("DUO"). The MSN Director is under no time limit to forward the application to the DUO. A deviation request thus is subject to indefinite delay.

Michael F. Wright
Counsel of Record
CASE, KNOWLSON, JORDAN
& WRIGHT LLP
2049 Century Park East, Suite
3350
Los Angeles, CA 90067
Tel.: (310) 552-2766

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
112 Whitewood Road
Charlottesville, VA 22906
Tel.: (434) 978-3888

Steven D. Campen
Campen & Burgoon
Landon House
3401 Urbana Pike
Frederick, MD 21704
Tel.: (301) 668-5808

October 4, 2002